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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 909 OF 2010

Arvind Narayan Kale
Age 51 years, Occu. Agricultural
R/o Vizori, Taluka – Malshiras,
Dist. Solapur.

.. Appellant

Versus

The State of Maharashtra

.. Respondent

Mr. Raja Thakare a/w Mr. Shreeram Shirsat for appellant.
Smt. V. R. Bhonsale, APP for State.

CORAM: P. V. HARDAS &
A. S. GADKARI, JJ.

JUNE 25, 2015.

ORAL JUDGMENT [Per P. V. Hardas, J.] :-

1. The appellant, who stands convicted for offence punishable under Sections 498-A, 302 and 201 of the Indian Penal Code and sentenced to suffer RI for three years and to pay fine of Rs.1500/-, in default of which to undergo further RI for six months, imprisonment for life and to pay fine of Rs.5000/-, in default of which to undergo further RI for three years and RI for one year and to pay fine of Rs.1000/-, in default of which to undergo further RI for three months, with a direction that the substantive sentences shall run concurrently, by the Ad-hoc Additional

Sessions Judge, Malshiras, by judgment dated 16/10/2010, in Sessions Case No. 05 of 2006, by this appeal questions the correctness of his conviction and sentence.

2. Facts, as are necessary for the decision of this appeal, may briefly be stated thus :-

PW 8 – PI Dharmaraj Ombase, who was attached to Akulj Police Station was entrusted with the investigation of Crime No. 126 of 2005 under Sections 302, 498-A, 201 and 182 of the Indian Penal Code. The aforesaid offence was registered by PW 8 – PI Ombase on the basis of the report at Exh. 37 lodged by PW 5 – Dnyandeo, brother of deceased Shalan. Prior to the registration of the offence, a case of accidental death of Shalan had been registered at Police Station vide A.D. No. 43 of 2005 and the enquiry had been entrusted to Police Constable Surwase. Accordingly, an inquest panchanama at Exh. 34 had been drawn. A scene of the incident panchanama at Exh. 32 had been drawn. Clothes of deceased Shalan were seized under panchanama at Exh. 28. The appellant/accused was arrested on the same day under arrest panchanama at Exh. 29. The clothes of the accused were also seized in the presence of

panchas under panchanama at Exh. 29. Statements of witnesses were recorded.

On 5/10/2005, during custodial interrogation of the appellant/accused, the appellant expressed his willingness to point out the pillow. A memorandum of the appellant was accordingly drawn in the presence of panchas at Exh. 40. The accused led the police and the panchas to his house and produced a pillow, which was seized under seizure memo at Exh. 41. The accused also pointed out a mango tree, but nothing incrimination was found there. The viscera was referred to the C.A. under requisition at Exh. 55. Further to the completion of investigation, a charge-sheet against the appellant was filed.

Postmortem on the dead body of deceased Shalan was performed by PW 7 – Dr. Hemant Dixit. PW 7 – Dr. Dixit noticed the following external injuries :-

- (1) Bruise on right sub mandibular region, 1 inch near to mandibular angel (in front) size 2.1/2 cms x ½ cm. to 1.1/2 cms., on right side.

On internal examination, PW 7 – Dr. Dixit noticed the following injuries :-

- (1) Congested sub cutaneous tissue.
- (2) Red coloured discharge from left side angle of mouth.
- (3) Mutas membrane of mouth mild congested.

He opined that all the injuries were ante-mortem in nature and the external injuries were simple and were caused by hard and blunt object. According to him, the age of the injuries was 10 to 15 hours before death. He, therefore, opined that deceased Shalan had died due to asphyxia due to throttling. The postmortem report is at Exh. 50. He then opined that death may occur because of pressing of the neck by a pillow (Article 7).

3. On the case being committed to the Court of Sessions, trial court vide Exh. 11 framed charge against the appellant for offence punishable under Sections 498-A, 302, 201 and 182 of the IPC. Vide Exh. 12, the appellant denied his guilt and claimed to be tried. Prosecution in support of its case examined 8 witnesses. The defence of the appellant was of denial. The trial court, upon appreciation of the evidence, convicted and sentenced the appellant as afore-stated.

4. We have heard Mr. Raja Thakare, learned counsel for the appellant and the learned APP on behalf of the respondent – State. In order to effectively deal with the submissions advanced by before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

5. Prosecution has examined PW 5 – Dnyandeo, brother of deceased Shalan, who deposes that deceased Shalan was married to the appellant about 21 years prior to the incident. From the wedlock, Shalan had given birth to two sons, whose names are Sukumar and Kameshwar. The appellant earlier had been married to one Kusum, who had died due to fall in the well. According to Dnyandeo, for about 19 years the appellant treated Shalan well, but thereafter was subjecting her to ill-treatment and torture as he was suspecting the character of Shalan. The appellant used to assault Shalan and used to confine Shalan in a room and also used to threatened her that he would kill her as he had killed his first wife. According to Dyandeo, he used to frequently visit the house of Shalan and Shalan used to narrate him the ill-treatment given by the appellant.

Dyandeo deposes that on the next day of Diwali of the

previous year, younger son of the appellant by name Kameshwar had telephoned him and had informed him that Shalan was not present in the house and enquired from Dyandeo if Shalan had come to his house. Dyandeo replied in the negative and along with his maternal uncle Laxman went to the house of Shalan. He enquired from the appellant the whereabouts of Shalan and the appellant had disclosed to him that he had thrown Shalan in a well after killing her. Dyandeo, therefore, enquired from the appellant the location of the well. Dyandeo visited three wells in the locality, but the dead body of Shalan was not traced. On the way, he met his two cousins, who informed him that Shalan was at their house at Mahalung. Dyandeo along with his maternal uncle, therefore, went to Mahalung and noticed that Shalan was present there. He enquired from Shalan as to what had happened and Shalan had disclosed to Dyandeo that the appellant had taken her in the field at about 3 p.m. and had assaulted her as he was suspecting her character. Shalan, therefore, came to the house of her maternal uncle. Dyandeo then took Shalan to his house and Shalan resided at his house for about 8 to 10 days. The appellant also came to the house of Dyandeo and in the presence of Dyandeo and others, the appellant admitted his mistake. Shalan was then sent with the appellant, but the appellant continued to ill-treat Shalan. According to

Dyandeo, he used to go to the house of Shalan and Shalan used to disclose about ill-treatment.

Dyandeo also deposes that on 3/10/2005 at about 12.30 in the morning, he was present at his house and had received a telephone from the brother-in-law of Shalan, who informed him about suicide committed by Shalan. Dyandeo along with his step brother and maternal uncle, went to the house of Shalan and noticed the dead body of Shalan lying on the cement platform of the house. He noticed certain injuries on the dead body of Shalan and, therefore, went to the police station and lodged his report at Exh. 36. The police arrived at the scene of the incident and prepared the inquest panchanama and referred the dead body for postmortem examination. The last rites on the dead body of Shalan were performed after postmortem had been performed and thereafter PW 5 – Dyandeo lodged his report at Exh. 37.

6. In cross-examination, he has admitted that Exh. 37 was the first report he had lodged against the appellant during the last 21 years. He has also admitted that deceased Shalan had not lodged any report against the appellant. He has also admitted that Shalan had not issued any notice

to the appellant. He has admitted that in his report at Exh. 36, he has admitted that he had stated in his report that Shalan had committed suicide by hanging herself by rope to a mango tree. He has admitted that the medical officer had disclosed to him that Shalan had died because of strangulation. He has also admitted that the medical officer had informed him that Shalan had died as her mouth and nose were pressed by a pillow.

In the report at Exh. 36, there is no reference to an ill-treatment apart from a reference to quarrels between the appellant and his deceased wife Shalan. In the said report at Exh. 36, no suspicion was expressed on the appellant that the appellant had committed murder of his wife.

7. Prosecution has examined PW 3 – Dropadabai, the maternal aunt of deceased Shalan, who also deposes that Shalan was married to the appellant about 21 years prior to the incident and Shalan had given birth to two sons. According to Dropadabai, the appellant was suspecting the character of Shalan and used to quarrel with her. She further deposes that the appellant after assaulting her used to drive Shalan to the house of her parents. Dropadabai deposes that on two occasions the appellant had

driven Shalan to the house of her parents. Dropadabai, in fact, deposes that after two years of the marriage, the appellant started subjecting Shalan to ill-treatment and torture. She states that prior to the incident, the appellant had assaulted Shalan and had driven her out of the house and, therefore, Shalan had come to stay at Mahalung and resided there for 8 days. Shalan thereafter went to the house of her brother.

She further deposes that on 2/10/2005 she was present in the house of the appellant as she had gone to meet Shalan. She enquired from Shalan and Shalan disclosed to Dropadabai that the appellant had assaulted her after quarreling with her. Dropadabai, therefore, halted at the residence of the appellant. The appellant and Shalan slept in their bed-room, while Dropadabai along with the children of the appellant slept in another room. In the night, she heard some noise of quarrel and, therefore, knocked on the door of the bed-room of the appellant. However, no one open the door. At about 11.30 in the night, the younger son of the appellant woke up Dropadabai and requested Dropadabai to observe the abnormal behaviour of Shalan. The appellant had brought Shalan from the bed-room and had placed her on the platform of the house. According to Dropadabai, Shalan was already dead and had sustained an injury below the right ear, neck and

face. The nose of Shalan was also bleeding. The appellant then informed the incident to brother of Shalan. At about 2.30 a.m. brother of Shalan (PW 5 – Dyandeo) arrived at the house and Dropadabai informed the incident to PW 5 – Dyandeo. Dyandeo thereafter informed the police. She then deposes about the inquest panchanama having drawn.

8. In cross-examination, omission has been elicited that she had not stated in her previous statement that she used to frequently visit Shalan at her house after a duration of one or two months. Omission is also elicited that she had not stated in her previous statement that the appellant had driven Shalan out of the house after assaulting her. Omission is also elicited that she had not stated that after two years of the marriage, the appellant was ill-treating Shalan. Omission is elicited that she had not stated in her previous statement that she along with the sons of Shalan had slept in another room. Omission is also elicited that she had not stated that the appellant and Shalan slept in their bed-room. Omission is also elicited that she had not stated that the appellant had brought Shalan from bed-room and had placed her on a platform and on seeing the dead body, she had noticed swelling injury below right ear, neck and face. She had not stated in her previous statement that blood was oozing from the nose.

Omission is also elicited that she had not stated that at 2.30 a.m. brother of Shalan (PW 5 – Dyandeo) had come to the house of Shalan and that Dropadabai had disclosed the entire incident to Dyandeo.

Dropadabai admits that she had informed the police about the incident on the very night and the police had recorded her statement. She admits that she was present at the police station when Dyandeo lodged his report. She admits that Dyandeo had lodged the report on the basis of the information given by Dropadabai.

9. Learned counsel for the appellant has rightly criticized the evidence of this witness as that of an unreliable witness. PW 5 – Dyandeo does not refer to the presence of PW 3 – Dropadabai. If Dropadabai was really present at the scene of the incident and had witnessed the appellant bringing the dead body of Shalan and placing it on the platform or that Dropadabai had heard the quarrel earlier, we find it inexplicable that the same is not reflected in the evidence of PW 5 – Dyandeo or the report. There is no evidence at all to indicate that Dropadabai was present in the house of the appellant on the night when Shalan had died. In our opinion, therefore, no reliance whatsoever can be placed on the testimony of PW 3 –

Dropadabai. The evidence of PW 5 – Dyandeo regarding ill-treatment is extremely vague and omnibus. It is unbelievable that after 18 to 19 years of marriage, the appellant would suddenly begin to suspect the character of Shalan and would assault her. The children of the appellant, who were present in the house, have not been examined by the prosecution, though the eldest son of the appellant was about 18 years. No other evidence is tendered by the prosecution in respect of the ill-treatment by the appellant on the ground of suspecting the character of Shalan. The aforesaid ill-treatment is also not reflected in Exh. 36, which had been lodged by PW 5 – Dyandeo immediately on noticing the dead body. In Exh. 36 it is only stated that there used to be frequent quarrels between the appellant and deceased Shalan. There is no reference to any ill-treatment on account of the appellant suspecting the character of Shalan. Thus, in our opinion, the prosecution has utterly failed in proving the offence under Section 498-A of IPC beyond reasonable doubt and the appellant is entitled to be given the benefit of doubt.

10. Prosecution, in order to establish that deceased Shalan died a homicidal death, has examined PW 7 – Dr. Dixit, who had performed the postmortem examination. PW 7 – Dr. Dixit has stated that the age of the

injuries was 10 to 15 hours before death. Deceased was pronounced dead when the deceased was taken to the hospital. No opinion is expressed in the postmortem report as the opinion was reserved. If the deceased had died due to throttling, we see no reason as to why the opinion was reserved. In Exh. 51, which is the final cause of death, the opinion which is expressed is death due to asphyxia due to throttling. In the examination-in-chief, PW 7 – Dr. Dixit has also expressed a possibility that deceased may have been smothered with a pillow. Smothering and throttling are completely different and we find inconsistency in the opinion expressed by PW 7 – Dr. Dixit. The clothes of the accused were stained with human blood, but the group could not be determined. The pillow which was examined did not show presence of any blood stains. Though broken pieces of bangles were found in the house, the deceased does not appear to have sustained any injuries on account of breaking of the bangles. There are no injuries caused to the deceased as a result of any resistance being put by the deceased. In cross-examination, PW 7 – Dr. Dixit has admitted that he had put the date as 12/6/2010 on Exh. 51, though he had received the viscera report on 18/6/2010. He has also admitted that he has not specified the grounds on the basis of which he gave his opinion regarding cause of death in Exh. 51. He has admitted not to have mentioned the cause or the age of

the injuries in Column No. 17 of the postmortem report. If the medical officer had opined that deceased had died due to throttling, it is extremely strange that he maintained that deceased had died due to smothering. The pillow does not bear any evidence of having been used for the purpose of smothering. The discovery of the pillow, therefore, loses its relevance. We, therefore, find that implicit reliance cannot be placed on the evidence of PW 7 – Dr. Dixit in respect of the findings arrived at by Dr. Dixit.

11. Reference may usefully be made to the judgment of the Supreme Court in **Mayur Panabhai Shah vs. State of Gujarat [(1982) 2 SCC 396]**. The Supreme Court in the said judgment, at paragraph 2 has held thus :-

“..... Even where a doctor has deposed in court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth.....”

The Supreme Court in **State of Haryana vs. Bhagirath and ors. [(1999) 5 SCC 96]** at paragraph 15 has held thus :-

“15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly, if the opinion given by one doctor is consistent with probability the court has no liability to go by that opinion mere because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject”.

12. Supreme Court in **Shivappa and ors. vs. State of Karnataka [(2008) 11 SCC 337]** has held at paragraph 15 as follows :-

“15. Medical opinion is admissible in evidence like all other types of evidences. There is no hard-an-fast rule with regard to appreciation of medical evidence. It is not to be treated as sacrosanct”.

Supreme Court in **Gangabhavani vs. Rayapati Venkat Reddy and ors. [(2013) 15 SCC 298]** has held thus: -

“..... However, the opinion given by a medical witness need not be the last word on the subject. Such an opinion is required to be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all an opinion is what is formed in the mind of a person regarding a particular fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts, it is open to the Judge to adopt the view which is more objective or probable. Similarly, if the opinion given by one doctor is not consistent or probable, the court has no liability to go by that opinion merely because it is given by the doctor....”

13. We thus find that implicit reliance cannot be placed on the testimony of PW 7 – Dr. Dixit to record a finding that deceased Shalan had died a homicidal death. The appellant, therefore, in our opinion, is entitled to be given the benefit of doubt.

14. Accordingly, Criminal Appeal is allowed and the conviction and sentence of the appellant is hereby quashed and set aside and the

appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the appellant, be refunded to him. Since the appellant is in jail, he be released forthwith, if not required in any other case.

(A. S. GADKARI,J.)

(P. V. HARDAS,J.)